

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SUSAN T. GASSWINT**  
Claimant

VS.

**SUPERIOR INDUSTRIES INT'L-KS., INC.**  
Self-Insured Respondent

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Docket No. 1,018,253

**ORDER**

The self-insured respondent requests review of the February 20, 2006 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on June 21, 2006.

**APPEARANCES**

William L. Phalen of Pittsburg, Kansas, appeared for the claimant. Troy A. Unruh of Pittsburg, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that if the claimant is entitled to a work disability, the 26 percent task loss finding was appropriate as well as the different work disability percentages due to different wage loss percentages as determined by the ALJ.

**ISSUES**

The Administrative Law Judge (ALJ) found the claimant's termination did not preclude an award of permanent partial disability compensation based on work disability (a percentage of disability greater than the percentage of functional impairment). Consequently, the ALJ awarded the claimant a 14 percent functional impairment from the date of accident through April 30, 2004; a 63 percent work disability from May 1, 2004, through June 16, 2004; 50.5 percent work disability from June 16, 2004 through February 6, 2005, and then a 48.5 percent work disability beginning February 6, 2005.

The respondent requests review of nature and extent of disability. Respondent notes the claimant was terminated for cause after requesting, on two occasions, reimbursement for medical mileage which included trips she did not make to physical therapy appointments. Respondent argues claimant's award should be limited to her percentage of functional impairment because she was terminated "for cause" from an

accommodated job. Respondent further argues the claimant's functional impairment should be reduced to 12 percent based upon the AMA *Guides*<sup>1</sup>.

Conversely, claimant argues she did not check the mileage request forms that were filled out by her husband. And when the error was discovered on the first form submitted she was simply told to be more careful, no disciplinary action was taken and she was not warned that a repeat offense would result in termination. Consequently, claimant requests the Board to affirm the ALJ's Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The respondent requested review of the ALJ's February 20, 2006 Award. The respondent later submitted to the Board a document entitled Submission of Additional Authority. The purported additional authority consisted of a document entitled Final Agency Order in an action against claimant pursuant to K.S.A. 44-5,120(d) for making a false statement in order to obtain workers compensation benefits. The attached documentation was neither submitted to nor considered by the ALJ. The claimant objected to introduction of the documents. As the evidentiary record was closed, the documentation will not be considered by the Board nor included as part of the evidentiary record. Moreover, it is mandatory under K.S.A. 44-555c(a) that the review of the Board be "upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge." The evidence attached to respondent's brief was not presented to the ALJ, and will not be considered by the Board.

A more difficult question is raised regarding a document entitled Order which was attached to the respondent's submission letter to the ALJ. This document was the initial hearing officer determination in an action against claimant pursuant to K.S.A. 44-5,120(d) for making a false statement in order to obtain workers compensation benefits. The ALJ specifically referenced that hearing officer's determination in his award.

A submission letter is merely a party's argument based upon their view of the facts and the law. It is intended to define the controverted issues and explain the party's position on the issues. However, such submission letters as well as the briefs filed with the Board are not part of the evidentiary record. And documents or exhibits attached to submission letters are not considered part of the evidentiary record unless the parties agree. The

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

evidentiary record consists of the transcripts of hearings held and the testimony presented to the ALJ by evidentiary deposition and the exhibits received into evidence.

While it does not appear that claimant objected to the attachment to the respondent's submission letter to the ALJ, nonetheless, the timing of the filing of the respondent's submission letter and filing of the ALJ's Award would have practically eliminated the opportunity for claimant to object. But in her brief to the Board, the claimant did not raise any objection to the ALJ's reference to that material. And at oral argument to the Board it appears claimant's objection was to the document entitled Submission of Additional Authority. Accordingly, as it was considered by the ALJ, the Order will be considered part of the record. But as it was not a final adjudication of the matter it will not be accorded any weight.

The ALJ provided a detailed recitation of the facts in this case and the Board hereby adopts those findings and as its own to the extent that they are not inconsistent with the findings and conclusions expressed herein. Accordingly, they will not be restated except as necessary to explain the Board's findings.

Highly summarized, the claimant was working a light-duty job while receiving physical therapy after her right shoulder surgery. The claimant noted her physical therapy dates and doctor appointments on a calendar at her home and her husband used that calendar to fill out a Request For Travel Expense form provided by respondent for workers compensation claims.

On March 19, 2004, claimant submitted an unsigned Request For Travel Expense to respondent. Tim Rakestraw, respondent's safety supervisor, compared the submitted request with a printout from the physical therapy provider and determined that claimant had failed to show up for scheduled physical therapy sessions on 5 occasions but had still requested mileage reimbursement for 3 of those missed appointments.

Mr. Rakestraw met with claimant and told her about the discrepancy, revised the form to conform with the dates claimant had actually attended physical therapy sessions and had claimant sign the revised request for mileage reimbursement. Claimant testified that at that meeting she explained that her husband filled out the form based upon the calendar of her medical appointments and that led to the mistakes on the form. Claimant noted that no disciplinary action was taken against her at that time and further denied that she was told she would be terminated if it happened again.

Mr. Rakestraw corrected the form and had claimant sign it. He told claimant it was her responsibility to complete the form and that it was a serious matter to turn in falsified information. He testified claimant agreed and stated that she would make sure it didn't happen again. Mr. Rakestraw further noted that he did not take any formal disciplinary

action, other than the oral admonishment, because he gave claimant the benefit of the doubt on a first offense. Mr. Rakestraw testified:

Q. And what was in that discussion, what happened?

A. I called her in the office and the reason why I even questioned it in the first place is because I remembered Occ Health calling a couple of times -- or physical therapy calling and telling me that she had missed her appointment. So when I got this it made me call them to get the exact dates that she did miss, confirmed that she had missed them. So I called Ms. Gasswint into the office and talked to her and told her that there were some discrepancies in the dates that she had put down. And she told me that her husband was the one that completed that. **I told her it was her responsibility to complete those and to get those turned in; she needed to take this serious, because this was a serious matter of turning in falsified information. She understood, told me from this point on that she would make sure that she didn't do it again.** (Emphasis Added)

Q. Did you take any formal disciplinary action against Ms. Gasswint at this time?

A. No, we did not. We just gave her an oral -- talked to her orally and explained to her.

Q. Why didn't you give her a written warning or something at that time?

A. We were giving her the benefit of the doubt for the first offense.<sup>2</sup>

Finally, Mr. Rakestraw testified that at that meeting he told claimant any further such incidents could subject claimant to termination. Mr. Rakestraw testified:

Q. The first time that she made the mistake in presenting Exhibit Number 1 to you you did not tell her, "If you do it again you will be fired without warning"?

A. I told her she could be subject to termination because --

Q. That's not what you said on direct examination. You're adding that now? You're adding that you told her that if she did it again she would be fired?

A. I believe I told you before that we had the discussion that she could not do it again, it was her responsibility to do this, not her husband's.

Q. And that's --

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<sup>2</sup> Rakestraw Depo. at 9-10.

A. Yes, she was explained that you cannot do this, this is your responsibility to turn this stuff in, to get it correct, and if you do it any more that you could be subject to termination.

Q. You're adding that now?

A. Yes, I will add that right now.

Q. And so when the judge reads this through the first time when Mr. Unruh asked you and when I asked you the second time you're now adding that you did tell her that if she did --

A. It was all part of the conversation, yes.

Q. You are now adding that you told her that she could be subject to termination?

A. She could be subject to termination.

Q. And that's what you want the Court to believe?

A. Yes.<sup>3</sup>

On April 29, 2004, claimant submitted a signed Request For Travel Expense. Mr. Rakestraw again compared the travel dates with the provider's printout of appointments which indicated sessions missed by claimant. Once again the form claimant submitted listed travel for 6 appointment dates that claimant did not attend which included a date that no appointment was even scheduled.

When claimant arrived at work the next day she was told at the security gate that the form she had submitted included some incorrect information on her request for travel expenses and she was being placed on suspension pending an investigation. Claimant was provided a written disciplinary action which detailed that she was suspended for willfully falsifying company records by submitting a fraudulent request for travel expense. Claimant signed the document and in a remarks section noted that she thought her husband had corrected any errors or times she had not gone to the appointments.<sup>4</sup> Claimant was terminated for willfully falsifying company records.<sup>5</sup>

Claimant's excuse for continuing to have her husband fill out the reimbursement request form was that she was barely able to function because of her continuing pain and

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<sup>3</sup> *Id.* at 49-50.

<sup>4</sup> *Id.*, Ex. 3.

<sup>5</sup> *Id.*, Ex. 4.

the different pain medications. And although she had been admonished to not submit a request for reimbursement for trips she did not make, she did not remember whether she reviewed the second request for travel reimbursement before she turned it in to respondent.

Mr. Rakestraw explained the respondent's policy of progressive discipline which consisted of a verbal warning, followed by a written warning, followed by time off without pay or termination. But he noted that the progressive discipline steps can be skipped if the incident is serious enough to warrant immediate termination. And respondent had provided its employees a listing of work rules with assigned numerical values for violation of the rules.<sup>6</sup> If an employee accumulated 100 points or more the penalty was discharge. Willfully falsifying company records, including employment records was assigned 100 penalty points for a first offense.

An injured employee is barred from a work disability under K.S.A. 44-510e(a) if he or she is earning 90 percent or more of the employee's pre-injury wage. It is well settled that an injured employee must make a good faith effort to return to work within their capabilities in order to be entitled to work disability under K.S.A. 44-510e(a).<sup>7</sup> Additionally, permanent partial general disability benefits are limited to the functional impairment rating when the worker refuses to attempt or voluntarily terminates a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage.<sup>8</sup> And a termination for good cause can prohibit an employee from receiving an award of work disability.<sup>9</sup>

The Board notes that the test of whether a termination disqualifies an injured worker from entitlement to a work disability remains one of good faith, on the part of both claimant and respondent.<sup>10</sup>

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<sup>6</sup> *Id.*, Ex. 3.

<sup>7</sup> *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

<sup>8</sup> *Cooper v. Mid-America Dairymen*, 25 Kan. App. 2d 78, 957 P.2d 1120, rev. denied 265 Kan. 884 (1998).

<sup>9</sup> See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999), and *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

<sup>10</sup> See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001) and *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

The Board is mindful of the *Niesz*<sup>11</sup> decision where the Court found that a claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination and, thus, there could still be an award of work disability. In this case it cannot be overlooked that claimant had been warned about turning in mileage requests for trips she did not make. When she submitted her second Request For Travel Expense it was simply cross checked against the medical provider's records to determine if claimant had appeared at the appointments for which she requested mileage reimbursement. No further investigation was warranted or even necessary. Whether claimant or her husband prepared the form is not significant as claimant had been warned it was her responsibility to make sure the form was correct. When presented with the disciplinary document claimant's written excuse had again been that she thought her husband had correctly filled out the form. But she did not dispute the fact that she had requested reimbursement for trips she did not make. Her excuse was that she was not sure whether she even reviewed the form. But, simply stated, she signed the document and submitted it to the respondent in spite of the previous verbal warning regarding the serious nature of requesting reimbursement for trips she did not make. Under these facts the respondent adequately investigated the matter.

Claimant argues respondent failed to follow its own policy of progressive discipline. The Board disagrees. The evidentiary record established that respondent's progressive discipline policy consisted of verbal warnings followed by written warning followed by either suspension without pay or termination. But there were clearly infractions that would warrant immediate termination. In this instance, it should be noted that claimant could have been terminated because of the first incident but was initially given a verbal warning and not more severely disciplined because she was given the benefit of the doubt. It cannot be said the respondent acted in bad faith in making that determination. But after receiving the initial warning, the second incident clearly qualified as an infraction, pursuant to respondent's work rules, that subjected claimant to termination without the requirement of further progressive discipline.

In this case, claimant was terminated for filing a request for mileage reimbursement for trips she did not make. The claimant had been verbally admonished on the first occasion she had submitted a form containing such false information and warned it was a serious matter which could result in termination. She was told it was her responsibility to make sure future requests were correct and she indicated she understood. She then submitted the second form which she signed and again contained a request for reimbursement for 6 trips she did not make. Respondent's policy provides for discharge if 100 points are accumulated. Willfully falsifying company records was a 100-point infraction.

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<sup>11</sup> *Niesz v. Bill's Dollar Stores*, 26 Kan. App.2d 737, 993 P.2d 1246 (1999).

Although the ALJ disputed the reasonableness of the termination, the Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds claimant failed to act in good faith when she submitted the second request for mileage reimbursement which included trips she had not made. The Board concludes claimant's violation of respondent's policy was tantamount to a refusal to perform appropriate work as in *Foulk*<sup>12</sup> or failure to make a good faith effort to find or retain appropriate employment after recovering from work-related injuries as described in *Copeland*.<sup>13</sup>

The Board finds claimant is not entitled to a work disability because she was terminated for misconduct as held in *Ramirez*<sup>14</sup>. Accordingly, claimant's conduct is tantamount to refusing to work and, therefore, the salary that she was receiving from respondent should be imputed for the post-injury wage in the wage loss prong of the permanent partial general disability formula. As this would have been at least 90 percent of claimant's average weekly wage on the date of accident, claimant is limited to compensation calculated by using her functional impairment percentage.

The Board agrees with and adopts the ALJ's analysis and determination that claimant suffered a 14 percent permanent partial whole person functional impairment.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated February 20, 2006, is modified to award claimant compensation for a 14 percent permanent partial whole person functional impairment.

The claimant is entitled to 58.10 weeks of permanent partial disability compensation at the rate of \$440 per week or \$25,564 for a 14 percent functional disability, making a total award of \$25,564 which is ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

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<sup>12</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>13</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>14</sup> *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).



Dated this \_\_\_\_\_ day of September 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

We respectfully disagree with the majority and find the ALJ was correct in awarding claimant a work disability. The ALJ found claimant's actions may have been careless but they did not appear dishonest. Consequently, claimant's actions were not tantamount to refusing to work or failing to make a good faith effort to retain appropriate employment.

We also would exclude the Order that was attached to respondent's submission letter. The majority recognizes that documents attached to submission letters are not considered part of the record unless the parties otherwise stipulate or agree. That has been a longstanding interpretation of the law. But the majority now creates an exception to that interpretation by requiring a party to object to the document notwithstanding the fact the document was never formally offered into evidence at a hearing or deposition or that, as in this instance, there is no opportunity to object to the document before the award is entered.

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Troy A. Unruh, Attorney for Respondent